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In The

Supreme Court of the United States

October Term, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCALS 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Intervenor.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The California Agricultural Labor Relations Board (ALRB) hereby submits a brief pursuant to Supreme Court Rule 37.3 in support of Petitioners, Holly Farms Corporation and Tyson Foods, Inc. All parties have consented to the ALRB's participation as amicus curiae. Letters evidencing such consent are on file with the Clerk of the Court.

The ALRB, which is closely modeled on the National Labor Relations Board (NLRB), is the entity created under the laws of the State of California to administer the Agricultural Labor Relations Act (ALRA) (California Labor Code § 1140 et seq.). The ALRA extends to agricultural employees in California, who are specifically excluded from the NLRB's jurisdiction (29 U.S.C. § 152(3)), the same rights granted to employees in other industries under the National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). The ALRB, like the NLRB, is bound by the definition of agriculture contained in section 3(f) (29 U.S.C. § 203(f)) of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201, et seq.). Moreover, California Labor Code section 1140.4(b) limits the jurisdiction of the ALRB to employees excluded from the coverage of the NLRA. Due to the impact of federal preemption principles, the boundaries of the ALRB's jurisdiction are therefore controlled by the NLRB's interpretation of the NLRA's agricultural exemption. As a result, the ALRB and the State of California have a substantial interest in the NLRB's decisions defining agriculture.

The case before the Court is but one example of the NLRB improperly asserting jurisdiction over agricultural employees by ignoring the plain meaning of the language of section 3(f) of the FLSA, in particular, that portion which defines secondary agriculture as various practices "performed by a farmer *or on a farm*." (Emphasis added.) This problem is not confined to cases involving integrated poultry operations. By reading the "on the farm" component of 3(f) out of the definition of secondary agriculture, the NLRB has asserted jurisdiction over practices performed "on a farm" in the vegetable industry of California.

By narrowing the NLRA's agricultural exemption in defiance of the dictates of Congress as expressed in the annual rider to its appropriations acts, the NLRB has intruded into an area intentionally left to the states. Every time that the NLRB alters the scope of the NLRA's agricultural exemption, the effect in California is a shift in the jurisdiction of the ALRB and the consequent disruption of the administration of the ALRA and of bargaining relationships created thereunder. Where, such as here, the NLRB acts in defiance of the limits placed on it by Congress, such action also constitutes an indefensible intrusion into the jurisdictional realm left to the states.

SUMMARY OF ARGUMENT

In pertinent part, section 3(f) of the FLSA provides that what is known as "secondary agriculture" includes "any practices . . . performed by a farmer or on a farm as

an incident to or in conjunction with such farming operations. . . ." The plain language of this provision, as well as the legislative history and prior decisions of this Court, establish the independent significance of the phrase "or on a farm." Thus, work which is incident to a farming operation may be considered within the definition of secondary agriculture by virtue of being performed on a farm, regardless of whether the employees in question are employed by a farmer.[1] In spite of this unequivocal authority, the NLRB has, in this case and others, expressed the clearly erroneous view that employees cannot be engaged in secondary agriculture unless their employer is a farmer.

The legislative history of the FLSA demonstrates that the phrase "on the farm" was added to satisfy the concern of some senators that a definition of so-called "secondary agriculture" which was contingent upon the practices in question being performed by "farmers" would have the effect of leaving essential farming practices outside the scope of the exemption if a farmer hired others to perform them.

The legislative history further indicates that Congress was concerned with the competitive disadvantage of small farmers who could not afford the equipment and

[1] The argument contained herein is based solely on the view that the work of the live-haul crews falls within the NLRA's agricultural exemption because such work takes place on a farm and is incident to or in conjunction with that farming operation. The question of whether Holly Farms may be considered a farmer will not be addressed.

facilities necessary to prepare and deliver their raw agricultural products to market, and who would instead have to contract for such services with outside entities subject to the wage and hour provisions of the proposed bill. To address this concern, the words "or on a farm" and "including delivery to market" were added to ensure that the exemption for agriculture would cover all work, even if performed instead by an outside entity, that a farmer might naturally perform himself in order to get his raw agricultural products to market. There is no indication in the language of section 3(f) or in the legislative history that the size or nature of the outside entity is of any relevance. In addition, the inclusion of such work within the definition of secondary agriculture is supported by the interpretation of the courts and the Department of Labor.

The chicken catchers and forklift drivers at issue in this case indisputably perform their duties on a farm. Their work, which involves gathering the chickens and preparing them for delivery to market, is incident to and in conjunction with the contract growers' farming operations. The language of section 3(f) expressly includes preparation for and delivery to market as examples of activities that fall within secondary agriculture. Moreover, the nature of the work itself, rather than the nature of the business of the employer, is the proper focus. In this case, the work of the employees in question is unquestionably more closely related to the poultry raising activities on the farms of the contract growers than to the slaughtering operations of Holly Farms.

For the most part the work of the live-haul drivers takes place not on a farm but on public roads. However,

the work of the live-haul drivers originates on a farm and constitutes "delivery to market." Since the legislative history indicates that all labor performed in making delivery to market was intended to be swept within the definition of agriculture in section 3(f), the live-haul drivers are appropriately included within the agricultural exemption.

ARGUMENT

I

BY IGNORING THE PHRASE "OR ON A FARM," THE NLRB HAS REFUSED TO FOLLOW THE DICTATE OF CONGRESS THAT IT ADHERE TO THE LANGUAGE OF SECTION 3(f) OF THE FLSA DEFINING THE AGRICULTURAL EXEMPTION

Section 3(f) of the FLSA defines agriculture as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to

> storage or to market or to carriers for transportation to market.

The portion of the definition referring to what is known as secondary agriculture begins with the phrase "and any practices . . . performed by a farmer *or on a farm.*" (Emphasis added.) Basic canons of statutory construction dictate that the latter portion of this disjunctive phrase may not be ignored. See, e.g., 2A Sutherland, Statutory Construction (5th ed. 1992) § 46.06, pp. 119-120. Legislative history and subsequent case law confirm the independent significance of the phrase.

In *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 767 (1949), a case often cited for its explanation of the distinctions between primary and secondary agriculture, this Court construed section 3(f) of the FLSA in a manner which should have eliminated all doubt as to the independent legal significance of the phrase "or on a farm." The Court summarized the legislative history of the phrase "by a farmer or on a farm" as follows:

> This language was carefully considered by Congress. As originally introduced, the exemption covered such practices only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. To take care of that situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work

> was incidental to farming and was done on the farm.

Id. at 337 U.S. 767. As part of the same amendment that added the words "or on a farm," was the addition of language providing that all labor involving delivery to market would also fall within the definition of agriculture. 81 Cong. Rec. 7888 (1937).

More recently, the Court of Appeals for the Third Circuit followed the analysis of *Farmers Reservoir & Irrigation Co.* in finding that those who worked for a company that removed spent compost from mushroom growing operations fell within the agricultural exemption of section 3(f):

> Marrero's 'take-out' operation, although not performed 'by a farmer', is conducted 'on a farm' since the shoveling of the spent compost from the mushroom beds onto the conveyor belts takes place in the mushroom houses, and Marrero has not suggested that mushroom houses should not be treated as farms. (citations omitted) The removal of spent compost is 'incident to or in conjunction with' mushroom farming because the removal of spent compost is an integral step in the mushroom growing process; the mushroom beds cannot be made ready for the next crop until the removal is complete.

Donovan v. *Marrero*, 695 F.2d 791, 795 (3d Cir. 1982). The Department of Labor, as expressed in its regulations on the scope of secondary agriculture, unequivocally recognizes that the agricultural exemption applies to employees who work on a farm but not for a farmer, as long as the work is incident to or in conjunction with the

farming operations of the farm on which they are working. 29 C.F.R. §§ 780.128, 780.129.

Despite the plain language of section 3(f) of the FLSA and the weight of authority which establishes the independent significance of the phrase "or on a farm," the NLRB has simply ignored this portion of the definition of agriculture. In the underlying representation decision in the present case, the NLRB's analysis with regard to the live-haul employees consists of the following passage:

> As to the live haul employees . . . their position is not included either in the primary or secondary definition of "agriculture" in Section 3(f) of the FLSA. In this connection, the Board has consistently held that when an employer contracts with farmers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in the raising of poultry ends with respect to those chicks.

Brf. for the NLRB in Opp. to Pet. for Writ of Cert., App. 4a-5a.

The above passage illustrates that the NLRB's analysis is limited to the question of whether the employer is acting *as a farmer* with regard to the work assigned to the employees in question. There is no discussion of, or recognition of, the fact that the employees work on a farm and that such work is incident to or in conjunction with the farming operations on that farm. As will be illustrated below, the work of the live-haul crews falls within the definition of secondary agriculture.

The NLRB's truncated analytical framework is not peculiar to the present case or to cases involving integrated poultry operations. In *Produce Magic, Inc.*, 311

NLRB No. 173 (1993), a case originating in California and involving the harvesting and field packing of row crops by a custom harvester,[2] the NLRB made the same fundamental analytical error. After determining that the employees were engaged in primary agriculture only to the extent that they are actually severing the crops from the ground, the NLRB then considered whether the additional work involved in field packing, namely, placing heads of lettuce in plastic and putting them in cartons, constituted secondary agriculture. On page 7 of Regional Director's decision adopted by the NLRB, he states:

> The record in the instant proceeding reveals that the Employer does not cultivate any crops but instead provides harvesting and other services either to a grower or pursuant to 'joint deals.' Inasmuch as the lettuce handled by the workers in issue herein is not grown by the Employer, I find that the handling of that lettuce does not constitute secondary agriculture.

As the above passage indicates, the NLRB's analysis of secondary agriculture begins and ends with a determination as to whether the employer is a farmer. The NLRB's analysis fails to recognize that "such farming operations" relates back to both practices performed by a farmer and practices performed on a farm. The effective result is that the NLRB has changed the wording of section 3(f) from "incident to or in conjunction with such farming operations" to "incident to or in conjunction with *the employer's farming operations.*" This is despite the fact

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[2] A custom harvester acts principally as a provider of labor, but also provides other services such as the use of specialized equipment and transportation of the crop to market.

that the custom harvester in the *Produce Magic* case provided a service analogous to that provided by the threshing companies that were used as examples of the type of nonfarmer entities whose employees were intended to be swept within the definition of agriculture by the addition of the phrase "or on a farm." 81 Cong. Rec. 7653 (1937). In other words, the custom harvester was organized solely for the purpose of going from farm to farm to provide services to farmers that farmers would otherwise normally do with their own employees as a natural part of the farming process culminating with delivery to market.

In fact, the legislative history indicates that the intent was to cover within the definition of agriculture not just the employees of threshing companies, but the employees of all nonfarmer entities that come on a farm to provide a service that the farmer might ordinarily do himself as an integral part of the farming operation. The following colloquy concerning the "on the farm" amendment, which begins with Senator George disagreeing with Senator Black's earlier comment that the original bill was adequate to meet his concerns, is instructive:

> Mr. GEORGE. I am sure it does not in fact do so because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases, have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

> Mr. BLACK. Unquestionably.
>
> Mr. McGILL. I may say to the Senator from Georgia and other senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.
>
> Mr. GEORGE. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?
>
> Mr. McGILL. That is true; and the language would also include all the labor performed in making delivery to market.

81 Cong. Rec. 7888 (1937).

The ALRB participated as amicus curiae before the NLRB in the *Produce Magic* case and alerted the NLRB to the omission of any analysis concerning the "on the farm" portion of the definition of secondary agriculture. In both its original decision and in a subsequent denial of the ALRB's Motion for Reconsideration (reported at 318 NLRB No. 125 (1995)), the NLRB refused even to address the "on the farm" issue. This illustrates the fact that the error committed by the NLRB in the case now before the Court is intentional and systematic and has nationwide implications. The effect is particularly acute in a state like California, which has chosen to fill the void left by Congress and provide collective bargaining rights to its vast number of farm workers.[3] The uncertainty and disruption

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[3] The logic of the NLRB's improperly restrictive interpretation of agriculture would exclude labor contractors providing services on farms, since such entities are normally not farmers and, by definition, the farms on which they contract to provide

of existing bargaining relationships under the ALRA created by the NLRB's improper narrowing of the agricultural exemption carries potential adverse effects not only for farm workers, but for the business interests of growers as well.

II

THE CHICKEN CATCHERS AND FORKLIFT DRIVERS IN THE PRESENT CASE ARE UNQUESTIONABLY ENGAGED IN SECONDARY AGRICULTURE

It is undisputed that the work of the chicken catchers and the forklift drivers is performed on a farm. It is also apparent that their work, which involves gathering the chickens and preparing them for delivery to market,[4] is incidental to and in conjunction with the contract growers' farming operations. This is not only because such work falls within any common sense definition of the raising of poultry, but because the language of section 3(f) expressly includes preparation for and delivery to

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labor are not their own. This creates a particularly acute problem in administering the ALRA in California because, while the labor contractor would be considered the employer under the NLRA, under the ALRA the farmer engaging the labor contractor is deemed to be the employer. California Labor Code § 1140.4(c). In other words, this attempt by California to assign the bargaining obligation to the most stable and responsible party is rendered a nullity by the NLRB's interpretation of section 3(f).

[4] The farmer's "market" is normally the wholesaler, processor, or distributing agency to which the farmer delivers his products. 29 C.F.R. § 780.150. In this case, the contract growers' market is Holly Farms' processing facility.

market as examples of activities that fall within secondary agriculture. This truly unremarkable conclusion is confirmed by subsequent interpretation by the courts and the Department of Labor.

In its interpretive regulations, the Department of Labor states that the employees of a poultry processor who perform work on a farm of an independent grower as an incident to or in conjunction with the raising of poultry on the farm are employed in secondary agriculture, and that the cooping and loading of poultry are examples of such practices. 29 C.F.R. §§ 780.126, 780.151. In *Johnston* v. *Cotton Producers Association*, 244 F.2d 553 (5th Cir. 1957), the employee at issue was employed by a rural supply store, found to be a retail establishment, which had contractual arrangements with growers of chickens. A large portion of the employee's duties involved catching and cooping the chickens on the various farms and loading them on trucks for transport to processing plants. Citing the fact that this work was performed on a farm and involved preparation for and delivery to market, the court found it to be within the definition of agriculture.

As explained above, the NLRB itself has simply ignored the "on the farm" portion of section 3(f). The only known explanation by the NLRB of the operation of this language consists of the post hoc analysis of counsel for the NLRB contained in the NLRB's Brief in Opposition to the Petition for Writ of Certiorari. This analysis is inconsistent with both the plain language of section 3(f) and the pertinent legislative history, and is otherwise unavailing.

Counsel for the NLRB has argued that Congress meant only to exempt from FLSA coverage the employees of specialized independent contractors, such as threshing companies, who make a business of going from farm to farm and doing nothing but that single function. Brf. for the NLRB in Opp. to Pet. for Writ of Cert., p. 24. Under this analysis, it is asserted that Holly Farms does not fall within this category of businesses because its business does not consist solely of providing chicken-catching and hauling services to farmers.

First and foremost, the language of section 3(f) contains no such limitation. Moreover, this post hoc justification for the NLRB's decision in this case is at best disingenuous in light of *Produce Magic*. There, of course, the NLRB held that the employees of a custom harvester, who *does* make a business of going from farm to farm providing a specialized service to farmers, were not engaged in agriculture *only* because their employer was not a farmer.

Most importantly, there is absolutely no basis for asserting that Congress intended to restrict the reach of the agricultural exemption in such a manner. The threshing company was simply used as an example in the debates of a nonfarmer entity whose employees should be included in the agricultural exemption while working on a farm.[5] The motivation for the "on the farm" amendment was to protect the competitiveness of small farmers

[5] To put this in perspective, under the NLRB's analysis, if a wheat threshing service was provided not by a company that only performed threshing but by a company which owned a flour mill to which the threshed grain would be delivered, the work of the threshing crew would not be agricultural. There is

who did not have the equipment and facilities to perform themselves farming tasks that larger, more diverse farming entities could do themselves. 81 Cong Rec. 7657, 7659-7660.[6] Since so called secondary tasks performed by the large diversified agricultural operations would have fallen within the exemption as originally drafted because they would be performed by a farmer, the concern was that higher costs would be passed through to small farmers who would have to contract for those functions with outside entities whose employees would not be within the exemption (and therefore subject to the bill providing for a minimum wage and restrictions on hours of work).

To attempt to minimize this problem, it was decided to exempt the employees of such outside entities when they worked on a farm. The size or nature of the outside entity, i.e., whether it is organized only to provide a single service to various farmers, or is part of a larger or more diversified company, was immaterial to the motivation of Congress. This is because the motivation was to reduce costs to the small farmers, even though the mechanism was to do so indirectly by reducing labor costs to the outside entities providing services to small farmers. Therefore, the proper focus is on the nature of the work performed on the farm, not on who performs it. This is

no indication whatsoever that Congress intended such a distinction.

[6] While some senators originally sought to include within the exemption various processing functions small farmers contracted to have performed off the farm by nonfarmers, the eventual compromise was the amendment adding "or on a farm" and "delivery to market."

illustrated by the following passages from the Congressional debates.

After Senator McAdoo expressed the fear that the amendment adding "on the farm" and "delivery to market" would not cover agricultural cooperatives common in California, Senator McGill replied:

> Mr. McGILL: Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting . . . the words "on a farm", and also by . . . including delivery to market, it being the purpose of the amendment to exclude from the bill, all labor performed on a farm, whether by contract or otherwise, and to exclude all labor connected with the delivery to market of commodities produced on a farm.
>
> Mr. McADOO: I do not think it is sufficiently broad. I may say to the Senator from Kansas so much of the preparation of our crops in California is through farm labor cooperatives that the alterations made which have been made in the amendments I think do not widen it as much as needed.
>
> * * *
>
> Mr. McGILL: . . . I will state that I feel that the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday, such as mentioning harvesting, packing, and operations of that character. The amendment adopted yesterday was intended to include, and I think does include, all kinds of labor performed on a farm, and all kinds of

> labor in connection with delivering agricultural products to market.

81 Cong. Rec. 7927-7928 (1937). After Senator Pepper interjected briefly to persuade McAdoo to preserve the "liberal amendment inserted yesterday," McAdoo reiterates that his concern is to include the work performed by cooperatives in California. Senator George then replied that the nature of the entity performing the work is irrelevant to the amendment, which clearly includes the kind of services McAdoo sought to include:

> Mr. GEORGE: I suggest to the Senator from California that, in my opinion, the amendment offered by the Senator from Kansas is broader than his amendment, because it will take care of all operations, whether performed by cooperatives or persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is stated as a broad general proposition.

81 Cong. Rec. 7928 (1937).

Counsel for the NLRB also has offered the post hoc justification that the work of the live-haul crews does not fall within secondary agriculture because it is incident not to the contract growers' farming operations but to Holly Farms' poultry slaughtering operations. Brf. for the NLRB in Opp. to Pet. for Writ of Cert., p. 23. This is based on the assertion that the function of raising chickens ceases at the moment that the chickens reach maturity. This assertion by the NLRB is belied by both the plain language of section 3(f) and the underlying legislative

history. Its connection to common sense is tenuous as well.

The work of the chicken catchers and forklift drivers falls squarely within "preparation for market," which is one of the examples expressly included in section 3(f) as an activity that is "incident to or in conjunction with" farming operations. Moreover, as explained above, the legislative history reflects the intent of Congress that the agricultural exemption would encompass all activities contracted to be done by an outside entity that a farmer would otherwise normally perform himself in order to get his raw agricultural product to market. 81 Cong. Rec. 7653, 7657-7660, 7888 (1937). In this case, the live-haul crews are performing just such a task by preparing the raw agricultural product of the farms, live chickens, to be transported to market.

A key principle that is missing from the NLRB's analysis is that the inquiry must focus on the work actually performed by the employees, not on the business of their employer. *McLeod* v. *Threlkeld*, 319 U.S. 491, 497 (1943); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303 (197?); *Johnston* v. *Cotton Producers Association, supra*, 244 F.2d at 555. Thus, while the live-haul crews are employed by a slaughtering operation, the salient point is that the work they perform is an ordinary part of the operation of a chicken farm. The absurdity of the NLRB's claim that the farming operation ceases when the chicks have reached maturity is apparent when the even more absurd but logically necessary conclusion is drawn that the slaughtering operation begins at the moment on the farm when the chicks reach maturity.

Indeed, it may be said that the gathering of the chickens for transport is a necessary precursor to slaughter and is thus related to the slaughtering operation. But whenever an outside entity performs agricultural services on the farm of another, that work is obviously related in some manner to the outside entity's business interests. What must be determined is whether the work itself is of a character which is more naturally a part of the farming operation where it takes place or of the business of the employer. This is the teaching of *Bayside Enterprises, Inc., supra*, 429 U.S. 298, for the trucking of poultry feed involved in that case was found to be more logically a part of the nonagricultural feedmill operation of the employer than of the farming operations to which the feed was delivered. In contrast, it appears that the approach adopted by the NLRB is simply to inquire whether the work has any relation to the employer's business. Since there is by definition always some relation to the employer's business, such an approach would never result in finding on the farm work performed for a nonfarmer employer to constitute secondary agriculture. Consequently, such an approach is in reality no different from ignoring the phrase "or on a farm" altogether, for it would make the phrase meaningless.

III

THE LEGISLATIVE HISTORY INDICATES THAT WORK OF THE TYPE PERFORMED BY THE LIVE-HAUL DRIVERS WAS INTENDED TO FALL WITHIN THE DEFINITION OF AGRICULTURE

The work of the live-haul drivers arguably may be differentiated from that of the chicken catchers and forklift drivers, in that for the most part the work of the live-

haul drivers takes place on public roads rather than on a farm. However, the legislative history indicates that such work was intended to be swept within the definition of agriculture in section 3(f) because it constitutes "delivery to market."

As discussed above, the debates reflect that Congress was concerned that small farmers who could not afford the equipment and facilities necessary to prepare and deliver their raw agricultural products to market would be put at a competitive disadvantage by having to contract with outside entities who were subject to the proposed wage and hour provisions of the FLSA. The amendment agreed to in an effort to resolve this concern added the words "or on a farm" and "including delivery to market." 81 Cong. Rec. 7888 (1937).

While some senators desired an even broader definition of agriculture, the language of the agreed upon amendment accomplished two main purposes. The "or on a farm" phrase ensured that labor ordinarily performed as part of a farming operation would be exempt even if the farmer arranged for another entity to perform the work. The "delivery to market" language established the ending point of what constitutes "agriculture."

Thus, whether done by a farmer or not, agriculture was to extend until the raw agricultural products reached market. While delivery to market normally involves going off the farm, the key is that it originates on the farm. The breadth of the "delivery to market" phrase is indicated in Senator McGill's assurance to his colleagues that the language of the amendment "would also include all labor performed in making delivery to market." 81

Cong. Rec. 7888 (1937). Therefore, in light of legislative intent, the work of the live-haul drivers should fall within the definition of secondary agriculture.

CONCLUSION

The NLRB has, in this and other cases, improperly narrowed the definition of "agriculture" in section 3(f) of the FLSA, in defiance of the dictate of Congress that such definition be utilized in determining the parameters of the "agricultural laborer" exemption in the NLRA. The NLRB has done this by ignoring the legally significant phrase "or on a farm" and/or by interpreting the phrase "incident to or in conjunction with" in a manner which creates the same result. This fundamental analytical error has resulted in this case in the unlawful assertion of jurisdiction over agricultural employees, namely, the live-haul crews. In other cases and in other states, this same analytical error has resulted and will continue to result in the expansion of NLRB jurisdiction in excess of the authority conferred on it by Congress.

Should the agricultural exemption in the NLRA, as defined by section 3(f) of the FLSA, no longer be appropriate, in whole or in part, in light of the organization and character of modern agriculture, that is a matter for the consideration of Congress, not the NLRB. Until Congress decides otherwise, the exemption continues and the governing language of section 3(f) must be respected. The NLRB cannot be allowed to continue to peck away at the exemption until it is a virtual nullity. Unless this Court clearly directs the NLRB to adhere to the limits of its

authority, the result will be continued confusion and disruption in labor relations, particularly where, as in California, a state has stepped in to regulate an area Congress has thus far seen fit to leave to the states.

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Respectfully submitted,

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